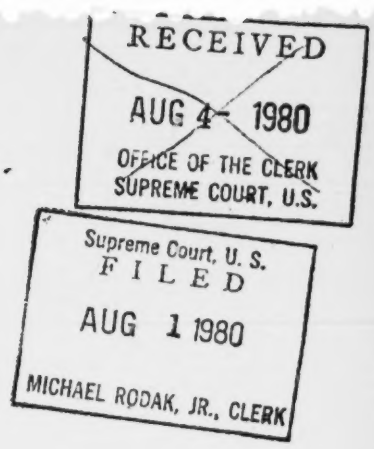
80-5163



IN THE SUPREME COURT

of the

UNITED STATES

==========

October Term, 1979

No. A-1036

==========

RUDY RAMOS ESQUIVEL,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

==========

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF CRIMINAL APPEALS OF TEXAS

==========

William E. Gray
P.O. Box 377
Simonton, Texas 77476
Telephone (713)346-1122

Terrence A. Gaiser
609 Fannin Street
Houston, Texas

PETITIONER'S LAWYERS

TABLE OF CONTENTS

Page

Citation to Opinion Below..... 1

Jurisdiction..... 1

Questions Presented..... 2

Constitutional and Statutory Provisions Involved..... 2

Statement..... 5

How the Federal Questions Were Raised and Decided Below..... 11

Reasons for Granting the Writ..... 12

This Court Should Grant Certiorari to Consider Whether the Rules of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, --U.S.--, No. 79-5175 (June 25, 1980) Were Violated by the Exclusion for Cause of Two Prospective Jurors Who Testified That the Possible Imposition of the Death Penalty Might "Affect" Their Deliberations, Where Petitioner's Court-appointed Counsel Did Not Object When the Trial Court Excused These Prospective Jurors.....12

Conclusion.....17

TABLE OF AUTHORITIES CITED

CASES — Pages

Adams v. Texas, --U.S.--, No. 79-5175 (1980).....2,12,14,17

Adams v. Washington, 403 U.S. 947 (1971).....15

Boulward v. State, 542 S.W.2d 677 (Tex.Crim.App.1976).....13

Burns v. State, 556 S.W.2d 270 (Tex.Crim.App.1977).....13

Crawford v. State, --S.W.2d--, No. 57,602 (Tex.Crim.App.1980) 14

Davis v. Georgia, 429 U.S. 122 (1976).....15

Freeman v. State, 556 S.W.2d 309 (Tex.Crim.App.1977).....13

Gardner v. Florida, 430 U.S. 349 (1977).....15

Harris v. Texas, 403 U.S. 947 (1971).....15

Hovila v. State, 532 S.W.2d 293 (Tex.Crim.App.1976).....13

Hovila v. State, 562 S.W.2d 243 (Tex.Crim.App.1978).....13

Hughes v. State, 562 S.W.2d 857 (Tex.Crim.App.1978).....13

Moore v. State, 542 S.W.2d 664 (Tex.Crim.App.1976).....13,14

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....16

Shippy v. State, 556 S.W.2d 246 (Tex.Crim.App.1977).....13

Smith v. State, 540 S.W.2d 693 (Tex.Crim.App.1976).....13

Wainwright v. Sykes, 433 U.S. 72 (1977).....13

White v. State, 543 S.W.2d 104 (Tex.Crim.App.1976).....13

Wigglesworth v. Ohio, 403 U.S. 947 (1971).....15

Witherspoon v. Illinois, 391 U.S. 510 (1968).....2,11,12,13,14,17

MISCELLANEOUS

Page

Constitution of the United States:

Sixth Amendment.....2

Eighth Amendment.....2

Fourteenth Amendment.....2

28 United States Code:

Section 1237(3).....1

Texas Penal Code:

Section 12.31.....2,12,13, 14,

Section 19.02(a)(1).....5

Section 19.03(a)(1).....5

Texas Code of Criminal Procedure:

Article 37.071.....3,4,5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. A-1036

==========

RUDY RAMOS ESQUIVEL
Petitioner

VS.

THE STATE OF TEXAS
Respondent

==========

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

==========

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on January 9, 1980, rehearing denied on May 5, 1980.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at --S.W.2d--, No. 62,779, dated May 5, 1980, and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1237(3), petitioner having asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

I

WHETHER THE JURY SELECTION AT PETITIONER'S TRIAL VIOLATED THE STANDARDS SET BY THIS COURT IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, --U.S.--, NO. 79-5175, (June 25, 1980).

II

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS COURT-APPOINTED TRIAL ATTORNEY FAILED TO OBJECT TO THE COURT'S ACTION IN EXCUSING JURORS FOR CAUSE EVEN THOUGH THEY WERE CLEARLY QUALIFIED UNDER WITHERSPOON.

III

WHETHER THE FAILURE OF PETITIONER'S COUNSEL TO OBJECT TO THE COURT'S EXCLUSION OF TWO WITHERSPOON-QUALIFIED JURORS UNDER THE INVALID STANDARDS OF SECTION 12.31(b) OF THE TEXAS PENAL CODE OPERATED AS A WAIVER OF PETITIONER'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS ESTABLISHED BY WITHERSPOON V. ILLINOIS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following provisions of Texas law:

TEXAS PENAL CODE SEC. 12.31. CAPITAL FELONY.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

TEXAS CODE OF CRIMINAL PROCEDURE, ARTICLE 37.071.

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberate-

ly and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is

is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEXAS PENAL CODE, SEC. 19.02(a)(1). MURDER.

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual.

TEXAS PENAL CODE, SEC. 19.03(a)(1). CAPITAL MURDER.

(a) A person commits an offense if he commits murder as defined under Section 19.01(a)(1) of this Code and:

(1) the person murders a peace officer . . . who is acting in the lawful discharge of an official duty and who the person knows is a peace officer . . .

STATEMENT

Petitioner was convicted of murdering peace officer Timothy Hearn, knowing that Hearn was a peace officer in the lawful discharge of an official duty. Represented by court-appointed counsel, petitioner entered a plea of not guilty.

A jury in the 180th Judicial District Court of Harris County, Texas, found petitioner guilty and, by affirmative answers to the punishment issues, sentenced him to death.

Upon appeal to the Court of Criminal Appeals of Texas, petitioner's conviction and sentence were affirmed in an opinion set out in Appendix "A", infra.

The constitutional issue presented by Question I arises from the jury selection.

A. Voir dire of venire member Max C. Nelson.

"Questions by the Court:

. . .

Q. Now, the defendant in this case is charged with an offense that's categorized or designated as a capital offense. When an individual has been found guilty by a jury of a capital felony, the punishment can be one of only two things, that is, life in the Texas Department of Corrections or death.

So, I must now inquire of you, sir, if you have any conscientious scruples against the infliction of death as a punishment for a crime in a proper case?

A. Yes, I do.

Q. You have some reservations about capital punishment that would prevent you from being an impartial (Record 1154) juror; is that correct?

A. That's correct.

Q. You believe that would affect your deliberations if you thought that it was either life or death; is that correct?

A. Yes.

MR. MOSELEY: [prosecutor] The State would challenge for cause, Your Honor.

MR. ROGERS: [defense counsel] I have no questions.

THE COURT: All right, sir. Thank you. We appreciate you having to wait so long." (R. 1155).

B. Voir dire of venire member Ann Guidry.

Ms. Guidry was opposed to capital punishment. (R. 925) As far as her ability to make an impartial decision on guilt or innocence, she said: "I'm not very sure about that. I know I feel very strongly that I would be opposed to going with the death sentence for a defendant. I think that I'm somewhat of an impartial, objective person. But I just don't know how -- once I got involved in a case and all that, I don't know how I would really handle it." (R. 926)

The court then elicited the following answers:

Q. Now, certainly, if you are selected as a juror in this case it would be your duty and your obligation not to let this mandatory penalty of life or death imprisonment (sic) affect your deliberations on any issue of fact. Do you understand?

A. Yes, sir.

Q. Could you and would you perform this duty if you are selected as a juror?

A. I would to the best of my ability do that.

Q. You would not let this mandatory punishment --

A. I'm saying that now. I don't know. I can't say what would happen to me. I would think, being the type of person that I am, that I would go along with what the law says should be done. But I think I would say no to the death penalty. I know that.

Q. Would you automatically vote against the imposition of capital punishment no matter what the facts might reveal? Would you just automatically vote against it?

A. I believe I would.

Q. You don't know for sure?

A. I would say I would vote against capital punishment. (R. 927)

Q. Then regardless of the facts, you could never assess death for punishment for any crime?

A. No, I don't believe I could.

Q. You're strictly opposed to it?

A. Yes.

Q. With that frame of mind, let me ask you if you would let that frame of mind interfere with your deliberation in the case if you knew your answer was going to be yes to a question that meant the death penalty? Would that interfere with your deliberation?

A. But I'm free to say no, so I wouldn't say yes.

Q. So, that would affect your deliberation?

A. Yes.

MR. DODD [prosecutor] We would challenge for cause.

MR. ROGERS [defense counsel] I have some questions.

(R. 928)

Petitioner's counsel explained the sentencing procedure applicable to capital cases in Texas, including the special issues submitted to the jury. (R. 929-932) Then he elicited the

following answers:

Q. . . . Regardless of what your feelings about the penalty are, do you think you could sit on a jury involving a case of capital murder and decide on the guilt or innocence phase without reference to the death penalty and decide whether the defendant was in fact guilty of that offense as (R. 932) is defined by law?

A. Yes, I could.

Q. So, you wouldn't let the mandatory life or death sentence affect your deliberation as far as determining if the man were guilty or innocent?

A. No, I would not.

Q. Now, do you feel like if you found the person guilty of capital murder that you could consider those questions, keeping in mind that the State in order to justify a yes answer has to bring the jury evidence to show beyond a reasonable doubt that the answer should be yes? If they don't, then the jury under its oath has an obligation to return a no answer.

Do you feel like you could answer yes or no to those questions based on the evidence and solely on the evidence without regard to considering the effect of your answers?

A. Yes, I could answer those questions yes or no.

Q. Do you feel like in answering those questions from the evidence that you would not be affected by the

ultimate outcome, that being either a life sentence or a death sentence?

A. That I would not be affected by it?

Q. In answering the questions? (R. 933)

A. No. I don't know if I understand your question correctly. You mean, after the trial, would I be affected in some way?

Q. Could you answer the questions without regard to the result of the answers? In other words, if you answer yes to all of them, the Court has to assess a death penalty. If you answer no to any of them, the Court has to assess a life sentence.

Do you feel like you could hear all the evidence and answer yes or no, depending on what the evidence called for, without letting the possible death sentence or life sentence interfere with your deliberations of affect your answer to the questions?

A. I believe it would interfere with my answering yes to those three questions, because the outcome, as you're stating it, would be -- if all the jurors said yes to those, that the death penalty would be given. My saying yes to that, is somewhat saying then that I would go along with the death penalty. Where, in fact, I don't.

So, I don't know how I could answer those. I think I would be really torn in trying to give a good answer to those, an honest (R. 935) answer to those three questions when I feel that way about the death

penalty.

Q. Would it be fair to say your feelings about the death penalty would be such that you would let your knowledge of the outcome of the answers to those questions affect the answer you would give?

A. Knowing if I said yes to the three of them that he would get death, yes.

THE COURT: The answer is yes to that question?

MS. GUIDRY: Yes.

THE COURT: All right.

MR. DODD: We will renew our challenge.

THE COURT: You are excused, ma'am. Thank you very much. (R. 935)

Petitioner's court-appointed counsel did not object to the court's rulings on either Nelson or Guidry.

Petitioner's challenge on appeal to the constitutionality of the exclusion for cause of venire members Nelson and Guidry was rejected by the Court of Criminal Appeals of Texas, and his conviction and sentence of death were affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Although petitioner's court-appointed counsel did not object when the court excused venire members Nelson and Guidry for cause, he did contend on appeal that the exclusion of these prospective jurors violated his right to a fair trial under this Court's holding in WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

The Court of Criminal Appeals of Texas rejected this

contention on the grounds that (1) since petitioner made no objection to the court's ruling nothing was presented for review, and (2) any error was harmless because the state used only 11 of its 15 peremptory challenges.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULES OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) AND ADAMS V. TEXAS, -- U.S.--, NO. 79-5175 (JUNE 25, 1980) WERE VIOLATED BY THE EXCLUSION FOR CAUSE OF TWO PROSPECTIVE JURORS WHO TESTIFIED THAT THE POSSIBLE IMPOSITION OF THE DEATH PENALTY MIGHT "AFFECT" THEIR DELIBERATIONS, WHERE PETITIONER'S COURT-APPOINTED COUNSEL DID NOT OBJECT WHEN THE TRIAL COURT EXCUSED THESE PROSPECTIVE JURORS.

At petitioner's trial, which began on July 31, 1978, two venire members were excluded in clear violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510, (1968). They were excluded under the same statute, Section 12.31(b) of the Texas Penal Code, and the same procedure, found to be constitutionally invalid by this Court in Adams v. Texas, --U.S.--, No. 79-5175, on June 25, 1980.

Even though the Court of Criminal Appeals of Texas again sustained the validity of Section 12.31(b) in affirming petitioner's death sentence, it further supported the affirmance by finding that petitioner (1) waived any possible Witherspoon violation when his court-appointed counsel did not object to the trial court's action, and (2) any error was harmless because the state used only eleven (11) of its fifteen (15) peremptory challenges.

As early as October 6, 1976, the Court of Criminal Appeals of Texas held that there was no merit to an objection that it was improper to exclude a Witherspoon-qualified juror on the broader ground of Section 12.31(b) of the Texas Penal Code. Moore v. State, 542 S.W.2d 664 (Tex.Crim.App.1976)

Even though petitioner's attorney did not object to the discharge of prospective jurors Nelson and Guidry, the rule of constitutional waiver announced by this Court in Wainwright v. Sykes, 433 U.S. 72 (1977), is inapplicable under the facts of this case.

At the time these venire members were interrogated, the Court of Criminal Appeals of Texas had consistently held, for almost two years, that prospective jurors who indicate that their feelings on the death penalty would "affect" their deliberations on any of the fact issues submitted to them, were properly excused under Section 12.31(b), regardless of whether their answers disqualified them under Witherspoon. Hovila v. State, 532 S.W.2d 293 (Tex.Crim.App. 1976); Smith v. State, 540 S.W.2d 693 (Tex.Crim.App.1976); Boulward v. State, 542 S.W.2d 677 (Tex.Crim. App.1976); White v. State, 543 S.W.2d 104 (Tex.Crim.App.1976); Shippy v. State, 556 S.W.2d 246 (Tex.Crim.App.1977); Burns v. State, 556 S.W.2d 270 (Tex.Crim.App.1977); Freeman v. State, 556 S.W.2d 309 (Tex.Crim.App.1977); Hovila v. State, 562 S.W.2d 243 (Tex.Crim.App.1978); Hughes v. State, 562 S.W.2d 857 (Tex.Crim.App.1978).

Petitioner's appointed counsel could only conclude from this unwavering line of authorities that the court's rulings on Nelson and Guidrey were proper under the settled Texas law.

Even after this Court's decision in Adams v. Texas, on June 25, 1980, the Court of Criminal Appeals of Texas sustained the exclusion of a Witherspoon qualified venireman under the ambit of Section 12.31(b), where no objection was made, again asserting that "Failure to object to the improper exclusion of a potential juror waives such error on appeal." Crawford v. State, --S.W.--, No. 57,602, decided July 16, 1980.

The speciousness of this ruling was excised in a dissenting opinion by Judge Roberts:

> "...[T]he Court can impose this waiver doctrine only by talking out of both sides of its constitutional mouth. On October 6, 1976, we held that there was no merit to an objection that it was improper to excuse a Witherspoon-qualified juror on the broader ground of Section 12.31(b). Moore v. State, 542 S.W.2d 664. Jury selection in this case began 6 months later (4/11/77). Now the Court holds that appellant was at fault for not raising an objection that we had 6 months earlier held to be legally worthless. At the least it is ungracious of us to require defense counsel to recognize merit in an argument when we could not; at worst, it denies him due process and due course of law on appeal. It is tantamount to saying that our opinions on constitutional law are so notoriously untrustworthy that attorneys are not justified in following them."

Judge Roberts correctly recognized that an Adams or Witherspoon violation "affects the very fact finders."

This conclusion is supported by the post-Witherspoon cases cited by this Court in Davis v. Georgia, 429 U.S. 122 (1976), i.e., Wigglesworth v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971); and Adams v. Washington, 403 U.S. 947, (1971).

In Gardner v. Florida, 430 U.S. 349 (1977), a plurality of the Court recognized that (1) the sentencing process of a capital murder trial must satisfy the requirements of the due process clause, and (2) the sentencing process of a capital murder trial is a critical stage of a criminal proceeding at which the accused is entitled to the effective assistance of counsel. There Mr. Justice Stevens, writing for the Court made the following comment where defense counsel made no objection to the trial court's consideration of a confidential report in assessing the death penalty, 430 U.S. at 360-362:

> "Since the State must administer its capital-sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia. In this particular case, the only explanation for the lack of disclosure [of the contents of the confidential report] is the failure of defense counsel to request

access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Nor do we regard this omission by counsel as an effective waiver of the constitutional error in the record. There are five reasons for this conclusion. First, the State does not urge that the objection has been waived. Second, the Florida Supreme Court has held that it has a duty to consider the 'total record,'. . . when it reviews a death sentence. Third, since two members of that court expressly considered this point on the appeal in this case, we presume that the entire court passed on the question. . . . Fourth, there is no basis for presuming that the defendant himself made a knowing and intelligent waiver, or that counsel could possibly have made a tactical decision not to examine the full report. . . ." [emphasis added]

Mr. Justice Stewart, writing for the Court in Schneckloth v. Bustamonte, 412 U.S. 218, 241 (1973), noted:

"A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.

Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided."

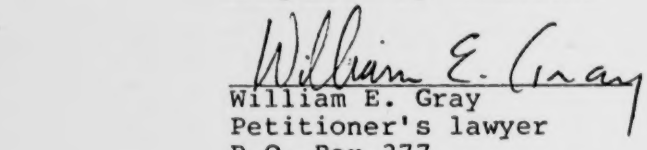
Both Witherspoon and Adams specify the constitutional model required in all capital trials. The mandate is explicit: Witherspoon is "a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams v. Texas, -- U.S.-- at --, 27 CrL3229, 3232. [emphasis added].

It seems evident that court-appointed counsel cannot, in a capital trial, grant the state a right to exclude prospective jurors on grounds impermissible under Witherspoon and outside the State's power of exclusion under the Constitution of the United States. It seems equally evident that the State cannot claim waiver of a right outside its power to curtail.

CONCLUSION

Petitioner prays that his petition for writ of certiorari be granted and that the sentence of death imposed in this cause be set aside as required by Witherspoon and Adams.

Respectfully submitted



William E. Gray
Petitioner's lawyer
P.O. Box 377
Simonton, Texas 77476
(713)346-1122

Terrence A. Gaiser

Terrence A. Gaiser
Petitioner's lawyer
609 Fannin Street
Houston, Texas 77002

CERTIFICATION

I certify that a copy of this petition was mailed, postage prepaid, on August 1, 1980, to Hon. Mark White, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711.

William E. Gray

William E. Gray

APPENDIX

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No 62,779, styled:

RUDY RAMOS ESQUIVEL — Appellant

VS.

STATE OF TEXAS — Appellee

the judgment of the 180th. Judicial District Court of Harris County, Texas was AFFIRMED on January 9, 1980, on March 5, 1980 the Appellant's Motion for Leave to File Motion for Rehearing was Denied and the issuance of the Mandate was stayed for 30 days, and on April 4, 1980, the mandate of this Court issued. THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR LEAVE TO FILE MOTION FOR REHEARING, this cause was disposed of by this Court on March 5, 198, the appellant having exhaused all remedies in this, the Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas, this the 16th. day of May, A. D., 1980.

THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas

RUDY RAMOS ESQUIVEL, Appellant

NO. 62,779 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appeal is taken from conviction for capital murder. V.T.C.A. Penal Code, Sec. 19.03(a)(1). Punishment was assessed at death.

On June 8, 1978 Officers Timothy Hearn and Murry Jordan of the Houston Police Department Narcotics Division received information that appellant possessed heroin. After conducting surveillance the officers approached appellant and several companions. Jordan attempted to search appellant. Appellant pulled a pistol and shot Jordan. Appellant then shot Hearn knowing at the time he was a police officer. Officer Hearn died as a result of the gunshot wounds and his death forms the basis of this prosecution. Appellant testified that he shot Hearn in self-defense.

In his first ground of error, appellant contends that the trial court erred in not granting his motion for continuance. Art. 29.03, V.A.C.C.P. provides that a criminal action may be continued upon motion of the State or the defendant for sufficient cause shown. A trial court's overruling of a motion for continuance must amount to an abuse of discretion in order to constitute reversible error. Nelson v. State, 505 S.W.2d 271. Trial on the merits began on August 14, 1978.

The record reflects that a hearing was held on appellant's motion. He produced witnesses who represented the major television stations and newspapers throughout Harris County. Their testimony shows that the factual details surrounding the shooting were thoroughly reported by the media the day of the shooting and the day after. Several newspaper articles noted appellant's prior criminal record and stated that he was on bond for possession of heroin at the time of the shooting. A news short included film footage from a 1953 trial

in which appellant was prosecuted for rape. The week before trial a Tim Hearn Memorial Softball Game was given radio and t.v. coverage but no information regarding the appellant was disseminated in these broadcasts.

Appellant produced no witnesses to testify that he could not receive a fair trial. No motion for change of venue was filed. Upon cross-examination a number of appellant's witnesses testified that they knew of no reason why appellant could not receive a fair trial in Harris County. An examination of the exhibits introduced at the hearing on appellant's motion and the testimony of the witnesses indicates that all the information contained therein was factual and informative. Adami v. State, 524 S.W.2d 693; Morris v. State, 488 S.W.2d 768; Taylor v. State, 420 S.W.2d 601. We find that the evidence supports the trial court's implied finding that appellant would not be deprived of a fair and impartial trial as the result of any prejudice in the public mind caused by pretrial publicity. Demochette v. State, 591 S.W.2d 488; Bell v. State, 582 S.W.2d 800, 810. No abuse of discretion is shown in overruling appellant's motion for continuance.

In his second ground of error, appellant contends that the trial court erred in denying his motion for a special venire. He maintains that "the Court in this case was without authority to refuse appellant's request for a special venire because Harris County, Texas, does not summon prospective jurors for the week, but rather on a daily basis."

Art. 34.01, V.A.C.C.P. provides:

> "A 'special venire' is a writ issued in a capital case by order of the district court, commanding the sheriff to summon either verbally or by mail such a number of persons, not less than 50, as the court may order, to appear before the court on a day named in the writ from whom the jury for the trial of such case is to be selected. Where as many as one hundred jurors have been summoned in such county for regular service for the week in which such capital case is set for trial, the judge of the court having jurisdiction of a capital case in which a motion for a special venire has been made, shall grant or refuse such motion for a special

> venire, and upon such refusal require the case to be tried by regular jurors summoned for service in such county for the week in which such capital case is set for trial and such additional talesmen as may be summoned by the sheriff upon order of the court as provided in Article 34.02 of this Code, but the clerk of such court shall furnish the defendant or his counsel a list of the persons summoned as provided in Article 34.04." (Emphasis added.)

It can be seen from the text of the statute that where as many as one hundred prospective jurors have been summoned for the week in which the capital case is set for trial, and where a request for a special venire is made, the trial court shall either grant or refuse the motion. Upon refusal, the court shall require the case to be tried by the regular jurors summoned for the week. The power of the trial judge to order a special venire or not in cases where at least one hundred prospective jurors have been summoned for the week has been held to be a matter within his discretion. Smith v. State, 397 S.W.2d 70; Johnson v. State, 319 S.W.2d 720.

It is appellant's position that it is the procedure in Harris County to summon panels of prospective jurors on a daily basis. He argues that Art. 34.01 gives the trial court discretion to refuse a special venire request only where at least one hundred jurors have been summoned for "the week." Therefore, he continues, the trial court lacked authority to refuse his request because it did not summon the panel for the week.

The record shows that Harris County does summon prospective jurors to appear on a daily basis. The jury coordinator of the court, Robert W. Clogston, testified that hundreds of jurors are summoned daily in Harris County.

Former Art. 2118 (Tex. Laws 1945, Ch. 229, Sec. 1, at 314) provided for the selection of qualified prospective jurors out of those summoned for the week. That statute provided in part:

> "On Monday, or other day, of each Court week, when a jury has been summoned and there are jury trials, the Court shall select a sufficient number of qualified jurors, in his discretion, to serve as jurors for the week. . . ."

The present statute[1] provides in part:

> "On any day when a jury has been summoned and there are jury trials the court shall select a sufficient number of qualified jurors, in his discretion, to serve as jurors. . . ."

The change in the statutory language of Art. 2118, supra, evidences a realization by our Legislature that in many metropolitan areas with multiple judicial districts, prospective jurors are now summoned and selected on a daily basis. The record in the instant case reflects that many more than one hundred prospective jurors are summoned on a daily basis in Harris County and literally thousands were summoned for the week in which the case was tried. We conclude that the decision of whether to grant a special venire was within the trial court's discretion.

Appellant maintains that if the trial court had discretion as to the granting of a special venire, then the court abused that discretion. He contends that providing him with a list of the persons summoned was an inadequate substitute for a special venire. Appellant argues that due to the great number of prospective jurors summoned daily he could not, without a special venire, intelligently exercise his peremptory challenges.

The record shows that in order to conduct voir dire the prospective jurors were brought into the courtroom in groups of 24 or 25 until a jury was chosen. Thus counsel for both sides were limited to that extent in evaluating the panel with their peremptories in mind. The trial court provided detailed questionnaires drafted jointly by both sides. These forms were filled out by jurors and returned to both parties. The record shows that 72 of these forms were filled out by prospective jurors. Individual members of the panels filled out these forms and the questionnaire was made available to counsel during voir dire of each prospective juror. Some 60 prospective jurors were questioned before a jury was selected. The transcript of the voir dire consists of 1,400 pages.

---

[1] Tex.Rev.Civ.Stat.Ann. Art. 2118 (Supp. 1980).

In the instant case, after denying the request for a special venire, appellant was furnished with a list of the persons summoned as provided in Art. 34.04, V.A.C.C.P.[2/] This action was in lieu of a special venire and in compliance with Art. 34.01, supra. We conclude that the trial court's action in following the statutory procedure after denying appellant's request for a special venire, did not constitute an abuse of discretion. Appellant's second ground of error is overruled.

In his third ground of error, appellant contends that the trial court erred in denying his motion styled "Motion to Determine All Prospective Jurors for Jury Selection." The motion was filed following the denial of appellant's request for a special venire. In the pretrial hearing, appellant's counsel stated the purpose of the motion in the following manner:

> "MR. ROGERS: I also have a motion which I'm filing now. It is a Motion to Determine all Prospective Jurors for Jury Selection. We're asking the Court to pick from the jurors summoned from Harris County, a sufficient number to pick the entire panel from which the jury for this case would be selected, for the reasons stated in the motion."

The trial court denied the motion after noting that appellant had been provided with a list of the prospective jurors who would be summoned for the week. In support of his contention that the trial court erred in overruling his motion, appellant relies on Crow v. State, 230 S.W. 148. In that case, the defendant requested the court to have all the veniremen called and their general excuses heard in order that he might know who among the venire were left to be examined further on voir dire. The record reflected that the trial court adopted the plan, not of having all the jurors sworn and tested primarily, and to render excuses, but called them in four at a time

---

2/ That statute provides in pertinent part that in a capital case no defendant shall be brought to trial until he shall have had at least two days a copy of the names of the persons summoned as veniremen for the week in which his case is set for trial.

and had the four sworn, excusing those who might have legal excuses, and then required the State and defendant to examine and pass upon those of the four who had not been excused. Although the conviction was reversed on another ground of error, the Court noted "this (procedure) was requiring both the State and defendant to act somewhat in the dark with reference to the other veniremen, and we do not believe this is the proper practice." Crow v. State, supra at 153.

In the instant case, before the panels were brought into the courtroom, each member was tested as to his or her qualifications to serve and excuses were heard and ruled upon. This preliminary examination took place in the jury assembly room to which all prospective jurors are ordered to report. Once the panel of 24 or 25 prospective jurors arrived in the courtroom they were further questioned by the trial court pursuant to Art. 35.17(2), V.A.C.C.P. Each attorney was then allowed to individually voir dire the remaining panel members.

The record reflects that three separate panels were questioned before a jury was selected to serve in appellant's trial. Seven jurors were selected from the first panel, two jurors were selected from the second panel, and the remaining three jurors were selected from the last panel. By the time the third panel was brought into the courtroom, appellant had not yet used one-third of his peremptory challenges. As noted above, counsel was provided information about each prospective juror through the forms which the panel members filled out prior to individual voir dire.

Under the circumstances of this case, we cannot conclude that the court required appellant to "act somewhat in the dark with reference to the other veniremen." Furthermore, counsel's motion constituted an attempt to have the court empanel the equivalent of a "special venire" from which a jury would ultimately be picked. As we noted above, the trial court did not abuse its discretion in denying appellant's request for a special venire. No error is shown in the trial court's denial of appellant's motion to determine all prospective jurors.

In his fourth ground of error appellant argues that the trial court erred "by denying appellant his right under Art. 35.17(2), V.A.C.C.P. to individual voir dire examination of prospective jurors separate and apart from the remainder of the entire panel."

Art. 35.17(2), V.A.C.C.P., provides:

> "In a capital felony case, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court."

The record shows that the trial judge questioned the panel of prospective jurors concerning their knowledge of the case prior to allowing voir dire of individuals apart from the group. One of the jurors responded that he had read something in the newspaper. Other jurors then indicated they had heard or read something of the case. The judge then asked the panel if any of them had formed an opinion as to appellant's guilt or innocence. Several of the jurors responded affirmatively. As the judge questioned each juror regarding his opinion, defense counsel said, "Your Honor, I want to take this up with the people as we get to them" to which the judge replied, "No, you can't."[3/] Appellant now asserts that this exchange constituted an objection and an adverse ruling. We disagree. Defense counsel's interjection was in the form of a general request that did not contain the grounds upon which he relies on appeal. Failure to object at trial waives error, if any. Pizzalato v. State, 513 S.W.2d 566; see also, Bodde v. State, 568 S.W.2d 344; Moore v. State, 542 S.W.2d 664.

Even if appellant had properly preserved his contention we hold that the trial court did not deny appellant his right to voir

---

3/ Prospective jurors were later examined separate and apart from other members of the panel. Appellant's complaint is directed to the court's action during its examination of the panel.

dire the prospective jurors separately. Art. 35.17(2), V.A.C.C.P. provides that the court propound questions to the prospective jurors concerning legal principles applicable to the case. One of such topics which the statute enumerates is "opinion." In the instant case the court questioned each panel as to their opinion before allowing prospective jurors to be questioned individually by counsel separate from the panel. Some 60 prospective jurors were separately questioned before a jury was selected. We hold that the trial court did not err in questioning the panel as a group concerning their opinion of the case. See, Art. 35.17(2), V.A.C.C.P. No error is shown.

Appellant next contends that the trial court erred in overruling his challenge to the array of prospective jurors on the first panel. The grounds of his challenge are that the court failed to issue attachments for prospective jurors upon request and that prospective jurors were excused by persons not authorized to do so.

The record reflects that the court began questioning the panel of prospective jurors concerning their knowledge of the case. One juror responded that he read something in the newspaper whereupon the court undertook to question him further. Defense counsel raised his challenge to the array at that time. The court told counsel that the challenge would be heard later. The record reflects the following exchange then occurred:

> "THE COURT: I'll consider it as being filed.
>
> "MR. ROGERS (defense counsel): Would you show the Court's indicated he will not consider any challenge to the array at this time or any request to attach missing jurors at this time prior to actual jury selection with this first panel of prospective jurors.
>
> "MR. MOSELEY (prosecutor): You're going to allow him to file his motion?
>
> "THE COURT: Yes.
>
> "MR. MOSELEY: It's to be considered as if it were filed.

> "MR. ROGERS: I'm requesting the opportunity prior to jury selection to present the challenge, and the Court has indicated it will not be heard at this time.
>
> "THE COURT: I'm perfectly willing, counsel, to let you dictate into the record what it is that you want to prove. But I'm not going to hear it. If you want to dictate in the record what you want to prove, you may."

After allowing defense counsel to dictate his challenge into the record the court overruled the motion because it was not timely presented. We need not reach the merits of the motion.

Art. 35.06, V.A.C.C.P. provides: "The court shall hear and determine a challenge to the array before interrogating those summoned as to their qualifications." (Emphasis added.) Art. 35.10, V.A.C.C.P. states that when no challenge to the array has been made, or if made, has been overruled, the court shall proceed to try the qualifications of those present who have been summoned to serve as jurors. Art. 35.12, V.A.C.C.P. defines the mode of testing the qualifications of prospective jurors:

> "In testing the qualification of a prospective juror after he has been sworn, he shall be asked by the court, or under its direction:
>
> > "1. Except for payment of poll tax or registration, are you a qualified voter in this county and state under the Constitution and laws of this state?
> >
> > "2. Have you ever been convicted of theft or any felony?
> >
> > "3. Are you under indictment or legal accusation for theft or any felony?"

Looking to the record it is clear that defense counsel did not raise his challenge to the array before the court qualified the panel. Art. 35.06, V.A.C.C.P. Rather, he brought the matter to the attention of the trial court after voir dire had begun. It is apparent that the trial court allowed defense counsel to dictate the substance of his challenge into the record by way of bill of exception. The court nevertheless declined to consider the merits of the motion. We

conclude that the action of the trial court was proper. Our Code of Criminal Procedure unambiguously requires a challenge to the array to be made before the panel is qualified. Articles 35.06, 35.10, 35.12, V.A.C.C.P. We hold that failure to raise the challenge before the panel is qualified constitutes a waiver of the opportunity to challenge the array.

Even if appellant had timely challenged the array no error is shown for the additional reasons that the form of the challenge was improper and appellant did not demonstrate harm. A challenge to the array must be in writing and it must be supported by affidavit. Art. 35.07, V.A.C.C.P. Appellant's challenge is set forth in writing in the record but it is not sworn to. In order to constitute an "affidavit" an instrument must be sworn to. See V.T.C.A. Penal Code, Sec. 1.07(35); Dedmon v. State, 478 S.W.2d 486; cf. Pena v. Southern Pacific Transportation Company, 555 S.W.2d 184 (Tex.Civ. App. - El Paso 1977, writ ref'd n.r.e.). In his formal bill of exception included in the record appellant argues that his affidavit was not sworn to because no clerk was present in the courtroom to have appellant swear to the challenge. An examination of the record shows that no request was made of the court to either provide a clerk to perform such duty or for the court to do so personally. Nor does appellant's formal bill of exception show that such request was made. We cannot conclude that the requirements of Art. 35.07, V.A.C.C.P. were complied with. Stephenson v. State, 494 S.W.2d 900, 905 (see also footnote 5 to that opinion). In addition, appellant failed to demonstrate harm by showing that he was forced to accept an objectionable juror. Walker v. State, 543 S.W.2d 634; Hurd v. State, 513 S.W.2d 936. No error is shown.

In his sixth ground of error appellant incorporates the arguments and authorities contained in ground of error number five and contends that the trial court erred in refusing to hear his challenge to the array. The action of the trial court was not erroneous for

the same reasons stated in our disposition of the foregoing ground of error. This ground of error is overruled.

In grounds of error twelve through fourteen, appellant contends that the trial court erred in excusing three prospective jurors on its own motion. Appellant did not object at the time the prospective jurors were excused by the court.

The record reflects that in making his general remarks to the panel, the court asked if any of the prospective jurors had heard anything about the charge filed against appellant. Three prospective jurors answered that they had heard about the case through media coverage. Each of these veniremen then stated that as a result of this information, they had formed an opinion as to appellant's guilt or innocence which would influence their verdict. At this point, the trial court sua sponte excused the three prospective jurors.

A trial court should not on its own motion excuse a prospective juror for cause unless he is absolutely disqualified from serving on the jury. See, Chambers v. State, 568 S.W.2d 313; Valore v. State, 545 S.W.2d 477. Under Art. 35.19, V.A.C.C.P., the trial court may on its own motion, excuse a prospective juror for any of the following reasons listed in Art. 35.16, V.A.C.C.P.:

> " . . .
>
> "2. That he has been convicted of theft or any felony;
>
> "3. That he is under indictment or other legal accusation for theft or any felony;
>
> "4. That he is insane or has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and either the court or the state in its discretion or the defendant or the prospective juror in his discretion is not satisfied that he is fit for jury service in that particular case;"

In the instant case, the three prospective jurors would have been subject to a challenge for cause under Art. 35.16(9), V.A.C.C.P., when they indicated that as a result of information, they had a

conclusion as to the guilt or innocence of appellant which would influence them in finding a verdict. Appellant has not shown how he was harmed by the exclusion of these prospective jurors, nor, has he established that he was tried by a jury to which he had a legitimate objection. See, Bodde v. State, supra; Valore v. State, supra. Furthermore, appellant's failure to object to the court's action in excusing the prospective jurors preserves nothing for review. See, Bodde v. State, supra; Moore v. State, supra. Appellant's twelfth through fourteenth grounds of error are overruled.

In his seventh and eighth grounds of error, appellant contends that the trial court abused its discretion when he was not allowed to question prospective jurors with regard to their understanding of the terms "deliberately" and "probability" as contained in Art. 37.071(b)(1)(2), V.A.C.C.P. The trial court ruled that appellant would not be allowed to question prospective jurors with regard to these terms in that they did not have a statutory definition or meaning.

The constitutional rights to counsel and trial by jury carry with them the right of counsel to interrogate members of the jury panel for the purpose of enabling counsel to exercise intelligently his peremptory challenges and, as a general rule, great latitude should be allowed by the trial court for such interrogation. Trevino v. State, 572 S.W.2d 336. Whenever some type of limitation is imposed upon the voir dire examination, reversal will result if such a limitation was an abuse of discretion. Mathis v. State, 576 S.W.2d 835; Trevino v. State, supra.

In Chambers v. State, supra, we found no abuse of discretion in the trial court's refusal to allow counsel to question a prospective juror on her understanding of the term "deliberately" as used in Art. 37.071(b)(1), supra. Likewise, in Battie v. State, 551 S.W.2d 401, no abuse of discretion was found in the trial court's

refusal to allow counsel to interrogate prospective jurors with regard to their understanding of the term "criminal acts of violence" as used in Art. 37.071(b)(2), supra.

The terms "deliberately" and "probability" do not have statutory definitions, thus, they are to be taken and understood in common language. See, Art. 3.01, V.A.C.C.P. As the Court noted in Battie v. State, supra at 405:

> "It takes no stretch of the imagination to recognize that voir dire examination could be endless if counsel were allowed to ask each prospective juror questions relative to his understanding of such words and terms as 'reasonable doubt,' 'criminal acts of violence,' and 'sound memory and discretion' which have been found to be 'words simple in themselves' that 'jurors are supposed to know such common meaning.'"

We find no abuse of discretion in refusing to allow counsel to interrogate prospective jurors relative to their understanding of the terms "deliberately" and "probability." Appellant's seventh and eighth grounds of error are overruled.

In his fifteenth ground of error, appellant contends that the trial court erred in sustaining the State's challenge for cause to prospective juror Esperanza Gil.

The record reflects that during the questioning by the State of prospective juror Gil, she made the following statements.

> " . . . (prosecutor)
>
> > "We do not have to prove the motive, why he killed the police officer. We may, and we may not. If I were to pull a gun right now and shoot someone in this room, the State would present that type of evidence. That would be sufficient evidence to show that I was guilty of murder. Do you see what I mean? And the State may not be able to prove what the motive was or that the person doing the killing had planned for several months.
> >
> > "You would not require the State to prove the motive of the defendant in killing the deceased or the premeditation on the defendant's part, would you?
>
> "A. That's not very clear to me.

"Q. As I said, we have to prove those five things. But we don't have to prove the motive. You would not require that the State prove the motive of the defendant in killing the deceased before you would find a defendant guilty, if those other elements were proven to you? Would you?

"A. I don't think so.

"Q. Well, you may be curious about his motive, but if the motive was not proven, could you convict someone of murder?

"A. If it was not proven?

"Q. If there was no evidence at all of any motive, could you convict someone of murder?

"A. No, I don't think so."

In response to questions by appellant's attorney, Gil stated:

"Q. So if the State proved to you -- of course, you might consider motive or premeditation as far as what penalty you wanted to inflict on the defendant. Obviously a calculated, planned murder is worse than a simple fight between somebody. But do you feel like if you felt the evidence showed beyond a reasonable doubt in your mind that a person intentionally or knowingly caused someone else's death without excuse, that you could find him guilty of murder?

"A. I think I would, yes."

Finally, the court questioned Gil:

"Q. Do you know what motive means?

"A. A reason?

"Q. That's exactly it. That's exactly what it means. A reason. So, if the State can prove the man did it, they don't have to prove why he did it. They don't have to prove the reason.

"The law doesn't require them to prove the reason. Some people might want a reason. If you believe that they should have a reason and you couldn't find him guilty unless they had a reason, then you are entitled to that belief. Now, that's the question. Are you going to require the State to prove a reason or a motive before you could convict?

"A. I think so.

"Q. You will?

"A. Yes."

In Chambers v. State, supra, the Court considered a contention concerning the sustaining of a challenge for cause to a prospective juror. In that case, the venireman indicated that she would require evidence of premeditation to support a conviction for capital murder. In that case, we held:

> "Although there was much vacillation on Brightman's (prospective juror) part, it appears that she would probably require some evidence of premeditation and thus could not follow the law. Premeditation is not an element of a murder case. The court's ruling that she was subject to challenge on this basis was sanctioned by Article 35.16(b)(3), supra. No error is shown. Further, the State did not exercise two of its peremptory challenges. One could have been used on this prospective juror as well as with the prospective juror Minicks."

Also see Bodde v. State, supra, in which we held that the trial court properly sustained the State's challenge for cause to a prospective juror who indicated that she would hold the State to a higher standard of proof than the statute required.

Likewise, in the instant case, we find no error in the trial court's action in sustaining the State's challenge for cause to Gil. Furthermore, the State did not exercise four of its peremptory challenges. One could have been used on this prospective juror. Appellant's fifteenth ground of error is overruled.

In his sixteenth ground of error, appellant contends that the trial court erred in sustaining the State's challenge for cause to prospective juror Anne Guidry. He maintains that she was excused in violation of the standards set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Appellant did not object when Guidry was excused following the State's challenge for cause.

The record reflects that during questioning by the court Guidry made the following statements:

> "Q. Would you automatically vote against the imposition of capital punishment no matter what the facts might reveal? Would you just automatically vote against it?

"A. I believe I would.

"Q. You don't know for sure?

"A. I would say I would vote against capital punishment.

"Q. Then regardless of the facts, you could never assess death for punishment for any crime?

"A. No, I don't believe I would.

"Q. You're strictly opposed to it?

"A. Yes."

In response to questions from appellant's counsel, Guidry stated:

" . . .

"Do you feel like you could hear all the evidence and answer yes or no, depending on what the evidence called for, without letting the possible death sentence or life sentence interfere with your deliberations or affect your answer to the questions?

"A. I believe it would interfere with my answering yes to those three questions, because the outcome, as you're stating it, would be -- if all the jurors said yes to those, then the death penalty would be given. My saying yes to that, is somewhat saying then that I would go along with the death penalty. Where, in fact I don't."

Appellant contends that Guidry's testimony merely shows that she had conscientious scruples against the death penalty. The record does not support the contention. Guidry's testimony makes it clear that she was opposed to the death penalty and regardless of the facts could not vote to assess death as a punishment.

As this Court noted in White v. State, 543 S.W.2d 104:

" . . . it was made abundantly clear in Witherspoon that the decision reached therein had no bearing on the right of the prosecution to challenge for cause any prospective juror who stated that he would automatically vote against the imposition of capital punishment without regard to the evidence which might be developed at the trial or that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt."

Based upon Guidry's statements, we find that the trial court did not err in sustaining the State's challenge for cause. She was properly excused under the standards set forth in Witherspoon. Furthermore, appellant's failure to object at the time Guidry was excused preserves nothing for review. See, Earvin v. State, 582 S.W.2d 794; Hughes v. State, 562 S.W.2d 857. Appellant's sixteenth ground of error is overruled.

In his seventeenth ground of error, appellant contends that the trial court failed to properly apply the standards of Witherspoon when the State's challenge for cause was sustained as to prospective juror Max Nelson. Appellant's failure to object at the time Nelson was excused preserves nothing for review. Earvin v. State, supra; Hughes v. State, supra. Furthermore, any error in excusing Nelson was harmless in view of the fact that the State used only 11 of its 15 peremptory challenges. See, Chambers v. State, supra at 321. Appellant's seventeenth ground of error is overruled.

In his tenth ground of error, appellant contends that the trial court erred in overruling his objection to opinion testimony. He maintains that the witness was not properly qualified to express an opinion that appellant would commit criminal acts of violence and constitute a continuing threat to society.

During the punishment phase of the trial, the State called the Honorable Frank Briscoe as a witness. Briscoe stated that he had been a licensed attorney for 28 years. He related that from 1950 to 1954 and 1957 to 1959 he was an Assistant District Attorney in Harris County. From 1960 to 1966, he served as District Attorney for Harris County.

Briscoe stated that he was in charge of the prosecution when appellant was tried and convicted of rape in 1953. He related that based upon his knowledge of appellant's rape conviction and subsequent criminal history, he was of the opinion that appellant would commit future criminal offenses and would continue to constitute a threat to society.

Under Art. 37.071(a), V.A.C.C.P., the trial court at the punishment phase has wide discretion in admitting or excluding evidence which

it deems relevant. Hammett v. State, 578 S.W.2d 699; Hovila v. State, 562 S.W.2d 243. However, this discretion extends only to the question of the relevance of the facts sought to be proved and does not alter the rules of evidence insofar as the manner of proof is concerned. Porter v. State, 578 S.W.2d 742.

In Burns v. State, 556 S.W.2d 270 where no psychiatric testimony was presented at the penalty stage (of the capital murder trial) relative to future acts of violence we stated:

> "Nevertheless, we find the facts adduced at the guilt stage of the trial in the instant case to furnish greater probative evidence to support the jury's answer than an opinion which may be gleaned by a brief psychiatric examination."

It could be urged with equal logic that a lawyer who had been familiar with a defendant's criminal record for 25 years and had prosecuted him for the crime of rape would be in a better position to predict future conduct than a psychiatrist who based an opinion on a brief visit in a jail cel

On the other hand, assuming that the witness was not qualified as an expert, in Denham v. State, 574 S.W.2d 129, we noted that lay opinion is admissible on many different subjects:

> "In this State, the opinions of lay witnesses, when competent, are admissible concerning sanity, insanity, value, handwriting, intoxication, physical condition -- health and disease, estimates of age, size, weight, quantity, time, distance, speed, identity of persons and things. . . ."

We note that unchallenged lay opinion on the probability of future acts of violence has been utilized in other capital cases. McMahon v. State, 582 S.W.2d 786 (defendant's reputation witnesses allowed to give opinion as to probability future violent behavior); Duffy v. State, 567 S.W.2d 197 (defendant's priest testified that he thought the defendant was the type of individual who would continue on a course of violence); Burns v. State, supra (District Attorney testified that in his opinion the defendant would commit more acts of criminal violence and constitute a continued threat to society).

We find no error in the trial court allowing the witness to express his opinion with regard to the probability of future acts of violence by appellant. Appellant's objection to the witness' qualifications to predict future acts of violence go to the weight rather than the admissibility of the evidence. Appellant's tenth

ground of error is overruled.

In his eleventh ground of error, appellant maintains that the trial court erred in failing to grant an instructed verdict as "to the offense of capital murder insofar as the indictment failed to allege same." He maintains that the indictment failed to allege that the deceased was a peace officer acting in the lawful discharge of his duties at the time he was killed.

The indictment alleges in pertinent part that appellant did:

> "intentionally and knowingly cause the death of TIMOTHY L. HEARN, by shooting him with a gun, hereafter styled the Complainant, a peace officer in the lawful discharge of an official duty, knowing at the time that the Complainant was a peace officer."

Although the phrase "hereafter styled the Complainant" is awkwardly positioned or improperly placed in the indictment, the import of the indictment is clear: that appellant was accused of shooting Timothy L. Hearn, a peace officer in the lawful discharge of an official duty, knowing at the time that Hearn was a police officer. We find that the indictment contained all of the elements of capital murder as proscribed by V.T.C.A. Penal Code, Sec. 19.03(a)(1). The trial court did not err in failing to grant an instructed verdict as to the offense of capital murder. Appellant's eleventh ground of error is overruled.

In his ninth ground of error, appellant contends that the trial court erred in allowing evidence concerning an out-of-court experiment. He maintains that the evidence was inadmissible due to the fact that the experiment was not made under substantially the same conditions as those which existed when the act to which the experiment related took place. He further argues that the witness was not qualified to perform the test.

Officer W. K. Alsip, of the Houston Police Department, testified that he performed a trace metal detection test on appellant's hands following the offense. He stated that the purpose of the test

is to determine whether a person recently held a metal object.

At the time he performed the test, appellant's hands were moist with blood. The results of the test were negative. He stated that in his opinion, the test result was negative due to the fact that appellant's hands were moist at the time the test was performed.

Over objection, Alsip was allowed to testify that he performed a trace metal test on himself after holding the gun which appellant fired at the scene of the offense. Alsip stated that his test results were also negative. He testified that this was due to the fact that the pistol was coated and that the metal that it was made out of did not show through.

On cross-examination, Alsip testified that he had no knowledge of the chemical reaction which would cause the results of the test to be either positive or negative. He further testified that he did not use the same solution of chemical spray in his test which was used in appellant's test. He did not know if the two cans of spray were made of the same chemicals.

Generally, the results of an out-of-court experiment are admissible in the discretion of the trial court if the experiment was made under similar conditions to the event to which the results of the experiment relate. The fact that the experiment was not made under exactly the same condition goes to the weight and not the admissibility of the evidence. See, 23 Tex.Jur.2d Evidence, Sec. 400 (1961); McCormick and Ray, Texas Evidence, Sec. 1461.5 (Supp. 1978).

In the instant case, the experiment was not performed under similar conditions to the testing of appellant's hands at the hospital. The same chemical solution was not shown to have been used in both tests. Furthermore, the reasons for the results in each test were different. We find that the trial court should not have admitted Alsip's testimony concerning the out-of-court experiment.

A judgment will not be reversed for the admission of evidence

that did not injure the defendant; the question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction. Jordan v. State, 576 S.W.2d 825; Myre v. State, 545 S.W.2d 820. In the instant case, appellant testified that he held and fired the gun which killed the deceased. Under the circumstances, we find the error in admitting evidence of the out-of-court experiment was harmless. Appellant's ninth ground of error is overruled.

The judgment is affirmed.

TOM G. DAVIS, Judge

(Delivered January 9, 1980)

EN BANC

Phillips, J., concurs in result

A True Copy
Attest:
Thomas Lowe, Clerk
Court of Criminal Appeals of Texas
By: _____
Deputy

twice before. I'm not going to go over it fully with you again, because I believe you understand. If you will go about your normal routine, then we will see you Monday morning.

Bring the next one out.

MAX C. NELSON

Questions by the Court:

Q Sir, will you state your name for me, please, into the record?

A Max C. Nelson.

Q Now, the defendant in this case is charged with an offense that's categorized or designated as a capital offense. When an individual has been found guilty by a jury of a capital felony, the punishment can be one of only two things, that is, life in the Texas Department of Corrections or death.

So, I must now inquire of you, sir, if you have any conscientious scruples against the infliction of death as a punishment for a crime in a proper case?

A Yes, I do.

Q You have some reservations about capital punishment that would prevent you from being an impartial

juror; is this correct?

A That's correct.

Q You believe that would affect your deliberations if you thought that it was either life or death; is this correct?

A Yes.

MR. MOSELEY: The State would challenge for cause, Your Honor.

MR. ROGERS: I have no questions.

THE COURT: All right, sir. Thank you. We appreciate you having to wait so long.

CHRISTINE I. RETTIG

Questions by the Court:

Q Please state your name for me, so the record will have it.

A My name is Christine I. Rettig.

Q The defendant in this case is charged with an offense that's classified in Texas as a capital felony. When a person has been convicted of an offense, that is, a capital felony there are only two possible punishments that can result. One of them is life in the Texas Department of Corrections, and the other is death.

Now, I must inquire of you if you

Q Then regardless of the facts, you could never assess death for punishment for any crime?
A No, I don't believe I would.
Q You're strictly opposed to it?
A Yes.
Q With that frame of mind, let me ask you if you would let that frame of mind interfere with your deliberation in the case if you knew your answer was going to be yes to a question that meant the death penalty? Would that interfere with your deliberation?
A But I'm free to say no, so I wouldn't say yes.
Q So, then it would affect your deliberation?
A Yes.

MR. DODD: We would challenge for cause.

MR. ROGERS: I have some questions.

Questions by Mr. Rogers:

Q Mrs. Guidry, the way the death penalty is set up in the State, the jury doesn't actually assess death as a punishment. Let me explain to you first the types of cases wherein a death sentence could possibly result.

THE COURT: I'm only going to let you go into this lady's ideas or her position on the death penalty itself. If you want to go into that, all right. That's the only reason I'm letting you talk to her.

MR. ROGERS: What I'd like to do is just tell her what capital murder is.

THE COURT: I've told her that this defendant is charged with capital murder.

MR. ROGERS: Well, as far as what constitutes capital murder as opposed to murder.

THE COURT: Counsel, go ahead and ask her what her position is on capital punishment.

MR. ROGERS: The Court has already asked that.

THE COURT: Then, are you satisfied with her answers? If you are, then you would have no objection.

MR. ROGERS: I would just like to let her know what these questions are and how they are determined by the jury.

THE COURT: All right. Go ahead.

Q (By Mr. Rogers) Mrs. Guidry, we have what is called a capital murder. Capital murder in Texas

is different from any other murder, because of certain aggravating facts that constitute the crime of capital murder.

In other words, in this case the indictment charges the defendant not only committed murder but that the deceased was a police officer who was engaged in the lawful discharge of his duties and that the defendant knew that at the time. If those additional facts are shown involving a police officer, then the law prescribes that as a capital murder offense. Do you follow me so far?

A Yes, I do.

Q The jury in this State does not actually vote to impose life or death. Those are the only two possible punishments for a capital murder offense. But the jury is not called on to simply say that they decide a life sentence or a death sentence.

In other words, it's not really within the province of the jury to make that decision. The way it's determined as to the penalty the defendant would get is by asking the jury two, possibly three, questions which have to be determined from the evidence. And the burden is on the State of Texas to prove, in

order to justify a yes answer to any of the questions, that the evidence warrants that yes answer beyond a reasonable doubt.

The first question is this: "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." Now, this question can be answered yes or no depending on what the evidence shows.

The second question is: "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." This is a determination from the evidence as to whether in the future there would be a probability that the man would commit criminal acts of violence. Do you follow me so far on those?

A Yes.

Q Those two questions are asked in every case of capital murder.

There is a third question which, if raised by the evidence, can be submitted to the jury. And the question is: "If raised by the evidence, whether the conduct of the defendant

in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."

Basically, if he's been found guilty of capital murder, you understand, he would not be justified or legally excused from killing the deceased, but this question has to do with the provocation, if there is evidence to show provocation, by the deceased, and was the defendant's response to that provocation in light of all the facts and circumstances unreasonable.

Now, if the jury answers yes on all three of these questions, then the Court, based on those answers, assesses the death sentence. If the jury answers no on any one of those questions, then the Court has to assess a sentence of life imprisonment.

Let me ask you this: Regardless of what your feelings about the death penalty are, do you think you could sit on a jury involving a case of capital murder and decide on the guilt or innocence phase without reference to the death penalty and decide whether the defendant was in fact guilty of that offense as

is defined by law?

A Yes, I could.

Q So, you wouldn't let the mandatory life or death sentence affect your deliberation as far as determining if the man were guilty or innocent?

A No, I would not.

Q Now, do you feel like if you found the person guilty of capital murder that you could consider those questions, keeping in mind that the State in order to justify a yes answer has to bring the jury evidence to show beyond a reasonable doubt that the answers should be yes? If they don't, then the jury under its oath has an obligation to return a no answer.

Do you feel like you could answer yes or no to those questions based on the evidence and solely on the evidence without regard to considering the effect of your answers?

A Yes, I could answer those questions yes or no.

Q Do you feel like in answering those questions from the evidence that you would not be affected by the ultimate outcome, that being either a life sentence or a death sentence?

A That I would not be affected by it?

Q In answering the questions?

A No. I don't know if I understand your question correctly. You mean, after the trial, would I be affected in some way?

Q Could you answer the questions without regard to the result of the answers? In other words, if you answer yes to all of them, the Court has to assess a death penalty. If you answer no to any one of them, the Court has to assess a life sentence.

Do you feel like you could hear all the evidence and answer yes or no, depending on what the evidence called for, without letting the possible death sentence or life sentence interfere with your deliberations or affect your answer to the questions?

A I believe it would interfere with my answering yes to those three questions, because the outcome, as you're stating it, would be -- if all the jurors said yes to those, then the death penalty would be given. My saying yes to that, is somewhat saying then that I would go along with the death penalty. Where, in fact I don't.

So, I don't know how I could answer those. I think I would be really torn in trying to give a good answer to those, an honest

RECEIVED
OCT 20 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-5163

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RUDY RAMOS ESQUIVEL,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

ANITA ASHTON
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 375-3281

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. Whether the jury selection procedure at Petitioner's trial was in accordance with the standards of Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).

II. Whether Petitioner's trial attorney's failure to object to the excusal of certain veniremen was ineffective assistance of counsel.

III. Whether the absence of an objection to the excusal of certain veniremen and the fact that the State used only 11 of its 15 peremptory challenges waived the error or in the alternative rendered it harmless.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 3

I. THE EXCUSAL OF THE VENIREMEN IN PETITIONER'S TRIAL WAS WITHIN THE GUIDELINES SET FORTH BY ADAMS V. TEXAS, ___ U.S. ___, 100 S.Ct. 2521 (1980) AND WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968). 3

II. PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT PRESENTING AN OBJECTION WAS NOT PRESENTED TO THE COURT BELOW. 4

III. THE ERROR, IF ANY, IN THE EXCUSAL OF THE VENIREMEN WAS WAIVED BY COUNSEL'S FAILURE TO OBJECT, OR, IN THE ALTERNATIVE, WAS RENDERED HARMLESS BY THE PRESENCE OF UNUSED PEREMPTROY CHALLENGES. . . . 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases	Page
Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).	i,2,3
Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991 (1978).	5
Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977).	2,4
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4
Davis v. United States, 411 U.S. 233 (1973)	5
Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App. 1980).	1
Estelle v. Williams, 425 U.S. 501 (1976).	5
Gall v. Commonwealth, ___ S.W.2d ___, (Ky., No. 79-SC-29-MR, decided Sept. 20, 1980)	6
Johnson v. Zerbst, 304 U.S. 458 (1938).	4
Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979).	5,6
Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, cert. denied, ___ U.S. ___, 100 S.Ct. 530 (1979)	5
State v. George, 346 So.2d 694 (La. 1977)	6
Tacon v. Arizona, 410 U.S. 351 (1973)	4
Witherspoon v. Illinois, 391 U.S. 510 (1968).	i,3,4,5

Constitutions, Statutes and Rules	
United States Const., Amend. VI.	1
United States Const., Amend. VIII.	1
United States Const., Amend. XIV.	1
28 U.S.C. §1257(3).	1
Tex. Penal Code Ann. §12.31(b) (Vernon)	1

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas, Respondent herein, and in response to the Petition for Writ of Certiorari of Rudy Ramos Esquivel would show the Court the following:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as Esquivel v. State, 595 S.W.2d 516 (Tex.Crim.App. 1980).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). However, as noted in the reasons for denying the writ, Petitioner has not presented to the Texas Court all of the issues which he presents herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Const., Amend. VI.
2. United States Const., Amend. VIII.
3. United States Const., Amend. XIV.
4. Section 12.31(b), Tex. Penal Code Ann. (1974).

STATEMENT OF FACTS

Petitioner was charged with the June 8, 1978, capital murder of Timothy L. Hearn, a peace officer in the lawful discharge of an official duty. He was appointed counsel on June 9, 1978. Jury selection commenced on July 31, 1978. Testimony began on August 14, 1978. On August 17, 1978, the jury returned a verdict of guilty of the offense of capital murder as charged in the indictment. The jury additionally returned a verdict of yes to all three special issues on August 18, 1978. The trial court then assessed punishment at death in accordance with statute.

Petitioner appealed his conviction to the Texas Court of Criminal Appeals. In that appeal he raised the issue of

jury selection procedures utilized at his trial. He did not however raise ineffective assistance of counsel for failure to make an objection to the excusal of certain veniremen. There was no issue raised as to the sufficiency of the evidence. Petitioner confessed to shooting the deceased and another officer. He also admitted prior convictions for forgery, escape, assault and rape.

SUMMARY OF ARGUMENT

Petitioner has alleged that his death sentence should be overturned for error during the jury selection. He specifically complains of the excusal of venireman Nelson (R. 1154-55) and venireman Guidry (R. 925-35). There was no objection to the excusal of either of these veniremen. Under Texas law, a correct contemporaneous objection is required at the time that the venireman is excused from the jury panel. Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977). Further, the State exercised only 11 of its 15 statutory peremptory challenges. If the State could exercise a peremptory challenge against a venireman who is excused by an erroneous challenge for cause, the error, if any, should be rendered harmless.

Respondent submits that both veniremen were properly excluded under the guidelines of Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980). Venireman Nelson stated that he had conscientious scruples against the infliction of death and further that his reservations would prevent him from being an impartial juror. Venireman Guidry stated that she did not believe in the death penalty and was strictly opposed to it. On further questioning, she affirmed that she could not "go along with the death penalty." (R. 934).

Petitioner further contends that his counsel was ineffective for not making an objection to the excusal of these two veniremen. This allegation was not presented to the Texas Court of Criminal Appeals; therefore, it is not proper

for review by this Court on petition for certiorari.

REASONS FOR DENYING THE WRIT

I.

THE EXCUSAL OF THE VENIREMEN IN PETITIONER'S TRIAL WAS WITHIN THE GUIDELINES SET FORTH BY ADAMS V. TEXAS, ___ U.S. ___, 100 S.Ct. 2521 (1980) AND WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner contends that venireman Max C. Nelson (R. 1154-55) and Anne Guidry (R. 925-35) were excluded in violation of the constitutional standards set forth in Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980) and Witherspoon v. Illinois, 391 U.S. 510 (1968). Venireman Nelson stated that his reservations would prevent him from being an impartial juror. When challenged for cause by the State, the defense attorney stated "I have no questions." (R. 1155). The State respectfully contends that venireman Nelson's answer that he would not be an impartial juror was sufficient to exclude him under the guidelines of Adams v. Texas, supra.

Venireman Guidry stated at the beginning of questioning that she was opposed to capital punishment. (R. 925). She further stated that she would automatically vote against capital punishment. (R. 927). On further questioning by Petitioner's counsel, she said that "I believe it would interfer with my answering yes to those three questions, because the outcome, as you're stating it, would be -- if all the jurors said yes to those, then the death penalty would be given. My saying yes to that, is somewhat saying then that I would go along with the death penalty. Where, in fact, I don't." (R. 934). She was then excused. Petitioner's counsel made no objection to her excusal. Since venireman Guidry stated her unequivocal opposition to the the death penalty, she was properly excluded for cause.

II.

PETITIONER'S ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL IN NOT PRESENTING AN OBJECTION WAS NOT PRESENTED TO THE COURT BELOW.

Since Petitioner did not present this question for consideration to the court below and it was not considered by the court below, it should not be considered on certiorari. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 351 (1973). Further, a careful analysis of the entire record leaves one with the unmistakeable impression that Petitioner's counsel rendered effective assistance. There is no showing that counsel's failure to object was not a tactical decision rather than ineffective assistance.

III.

THE ERROR, IF ANY, IN THE EXCUSAL OF THE VENIREMEN WAS WAIVED BY COUNSEL'S FAILURE TO OBJECT, OR, IN THE ALTERNATIVE, WAS RENDERED HARMLESS BY THE PRESENCE OF UNUSED PEREMPTORY CHALLENGES.

Trial counsel made no objection to the excusal of either venireman complained of in the petition for certiorari. The Texas Court of Criminal Appeals did not consider the error because of the absence of a correct contemporaneous objection. The same rules of procedural fairness apply in death penalty cases as in other cases. Witherspoon v. Illinois, supra. One such rule is that an objection is necessary to preserve error during voir dire unless there is a reasonable excuse for the failure to object. Boulware v. State, 442 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977). Silent acquiescence constitutes waiver no less than explicit consent. Each is an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Petitioner's trial began eight years after the decision in Witherspoon v. Illinois, supra. His constitutional rights regarding jury selection were well known to counsel, the prosecutor, and the trial judge.

If trial counsel may agree to a challenge, and then claim denial of a well known constitutional right on appeal, counsel can guarantee reversal whenever the jury finds his client guilty. This is the very practice condemned in Davis v. United States, 411 U.S. 233 (1973).

> Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thought that if those hopes did not materialize, the claim could then be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

411 U.S. at 241.

The right involved in the jury selection process is a trial-type right which may be waived by counsel. As stated in Estelle v. Williams, 425 U.S. 501, 512 (1976):

> Under our adversary system, once a defendant has the assistance of the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of the trial judge and counsel in our legal system.

Since Petitioner's counsel should have been aware of the constitutional standards enunciated in Witherspoon v. Illinois, supra, his failure to object at the time of trial should waive the error, if any, in the excusal of the two complained of veniremen.

Further, the State exercised only 11 of its 15 statutory peremptory strikes. It is reasonable to presume that the State would have exercised a peremptory challenge once the challenge for cause was denied. It would be poor strategy indeed for an attorney to not strike a venireman after a challenge for cause in the venireman's presence was denied. In at least three other jurisdictions, the state courts have held that the presence of an unused peremptory challenge renders the error, if any, harmless. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642, cert. denied, 439 U.S. 991 (1978); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, cert. denied, ___ U.S. ___, 100 S.Ct. 530 (1979); Jones v. State,

243 Ga. 820, 256 S.E.2d 907 (1979), cert. denied, ___ U.S. ___, 100 S.Ct. 437 (1980); State v. George, 346 So.2d 694 (La. 1977); Gall v. Commonwealth, ___ S.W.2d ___ (Ky., No. 79-SC-29-MR, decided Sept. 20, 1980).

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

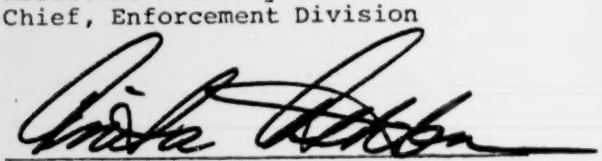
Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division



ANITA ASHTON
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

-6-